



No. 483

*In the Supreme Court of the United States*

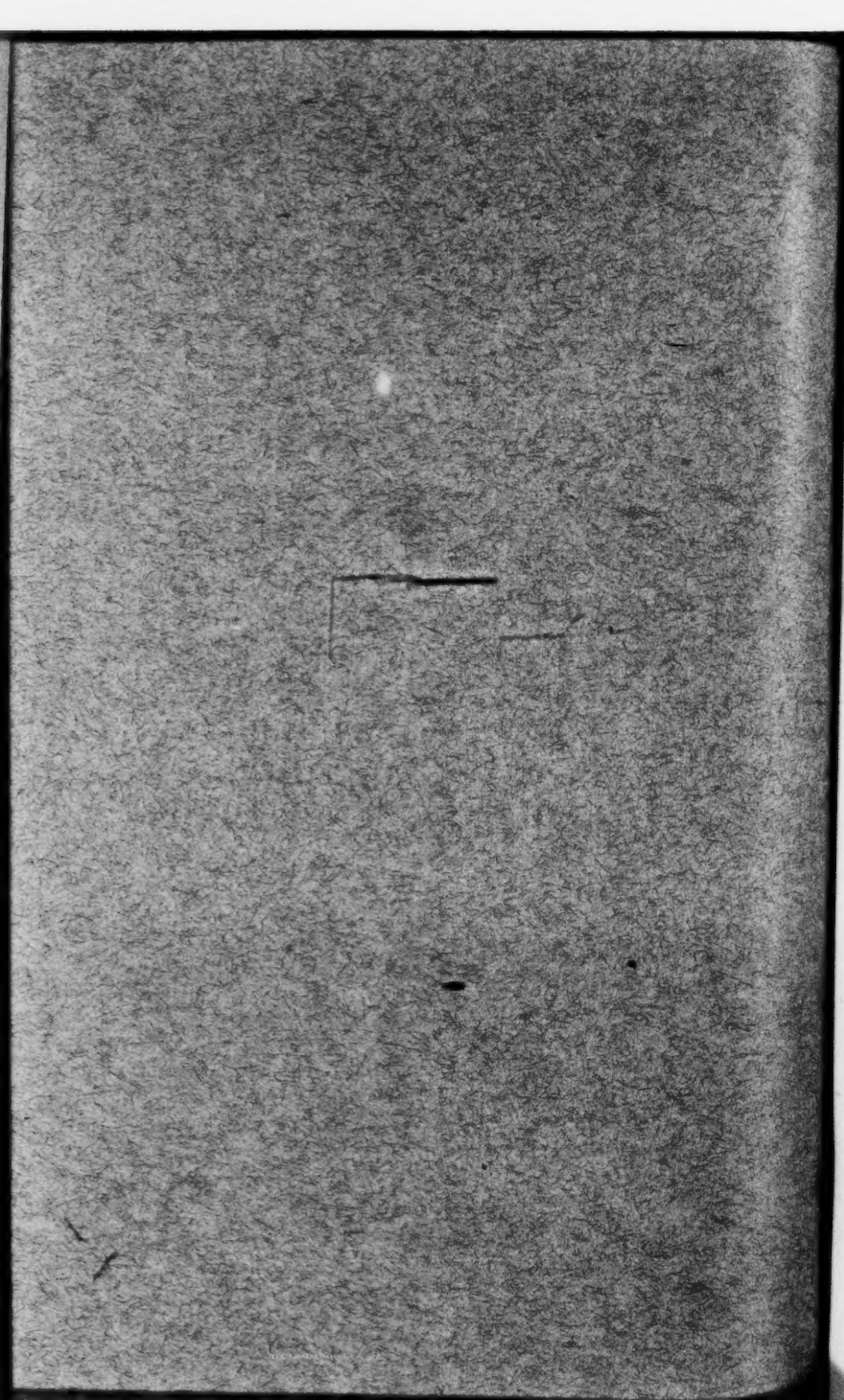
OCTOBER TERM, 1944

ALICE HOWE, AS EXECUTRIX OF THE ESTATE OF  
MARY E. HOWE, DECEASED, PETITIONER

THE UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF HABEAS CORPUS  
STATES CIRCUIT COURT OF APPEALS FOR THE  
CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA



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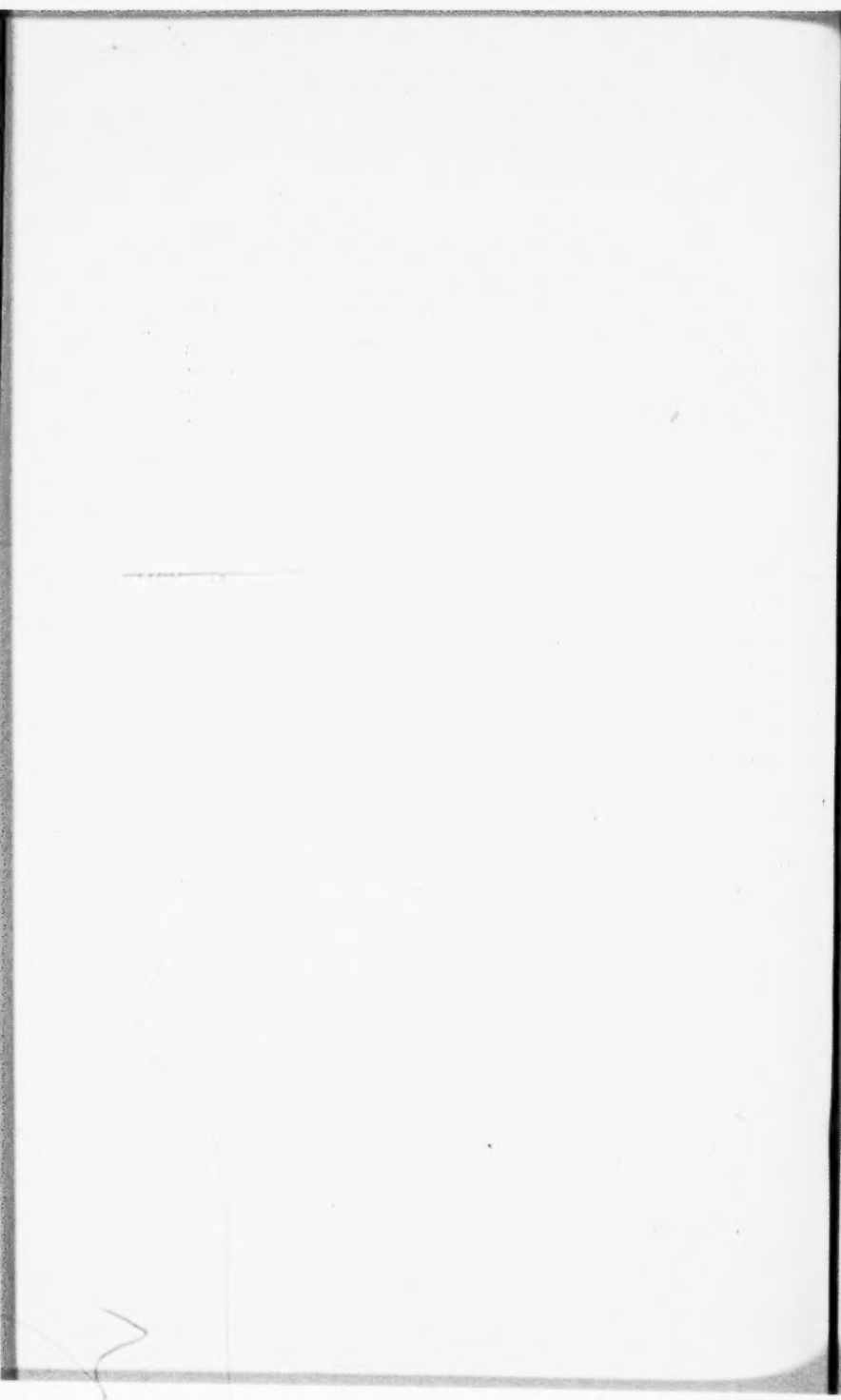
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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 433

ALICE HOWE, AS EXECUTRIX OF THE ESTATE OF  
MARY E. HOWE, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The memorandum opinions of the district court (R. 24-25, 33) are unreported. The opinion of the circuit court of appeals (R. 54-59) is reported in 142 F. 2d 310.

## JURISDICTION

The judgment of the circuit court of appeals was entered on April 25, 1944 (R. 60) and a petition for rehearing was denied June 6, 1944 (R. 75). The petition for a writ of certiorari was filed September 5, 1944. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether a gift in trust for the donor's seven children, was a gift of future interests under Section 504 (b) of the Revenue Act of 1932, precluding allowance of an exclusion of \$5,000 for each beneficiary.

#### STATUTE AND REGULATION INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

##### SEC. 504. NET GIFTS.

(a) *General Definition.*—The term “net gifts” means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than \$5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purpose of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 ed.):

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. “Future interests” is a legal term, and includes reversions, re-

mainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For the valuation of future interests, see subdivision (7) of article 19.

#### STATEMENT

In 1935, Mary E. B. Howe created a trust for the benefit of her seven children, and in 1937, she transferred additional property to this trust which was reported on her gift tax return at a valuation of \$33,500. No tax was shown, however, because seven exclusions totaling \$35,000 were claimed. The Commissioner of Internal Revenue disallowed six of the seven exclusions,<sup>1</sup> and assessed a

<sup>1</sup> Since *Helvering v. Hutchings*, 312 U. S. 393, had not yet been decided, the Commissioner took the view that the trust, not the beneficiary, was the donee. But after that decision was rendered, he adopted the position that the gifts were of future interests and that no exclusions were allowable. However, as the statute of limitation has run as to the exclusion allowed, only six are now actually involved.



tax of \$2,768.08. This sum plus interest was paid by the donor under protest and a claim for refund was filed but was rejected on May 5, 1941. The donor died on January 24, 1942, and the petitioner, as executrix, filed this suit to recover the tax (R. 2-3, 4, 16).

The trust agreement, which is set out as Exhibit "A" to the complaint (R. 5-11), provides that its general purpose is (R. 5)—

to conserve the assets while present circumstances render it difficult or impracticable to distribute them and to place the assets as rapidly as practicable in condition for liquidation and distribution.

The trustees are given legal title to the personal and real property transferred by the donor and are given "the broadest possible power in the holding, management and sale of the property" (R. 6). But the trust powers are qualified by the provision that before binding the trust in any building program which will involve a total expenditure of more than \$3,000, the trustees are required to give the beneficiaries ten days' notice, and, in case a majority expresses disapproval, the trustees are not to proceed (R. 6-7).

As to the time and manner of distribution of trust income and corpus the trust instrument provides (R. 8-9):

9. The Trustees may, in their discretion, arrange on what they regard as suitable terms for individual withdrawals of non-

liquid assets and for the charging of such withdrawals in an equitable manner against subsequent distribution of income and principal.

10. The Trustees shall, from time to time, distribute among the Beneficiaries such accumulated income as may in their judgment not be needed as a reserve for taxes and other obligations.

11. The owners of the beneficial interests shall have no power of anticipation or assignment *inter vivos* of any income or principal to be paid to them and the same shall be paid only to them personally and not to any other person by reason of any transfer or assignment of any prospective right to receive the same, or by reason of operation of law. In the event that any one of them shall voluntarily or involuntarily, or by operation of law be barred from receiving the payment thereof and applying same to his or her own uses, same shall be payable to his or her spouse, if any then living with him or her, and if none, then such payment shall be applied by the Trustees toward the care, support and maintenance of the owner in question and his or her family. The provisions of this paragraph shall be applicable to payments due to minors so that the Trustees shall in effect act as guardians during the minority of minor heirs of a deceased Beneficiary, but in no event shall the Trustees accumulate income after the date for final closing.

12. Upon a majority of the Beneficiaries or of the survivors of them joining in a written demand that the estate be closed and distributed, the Trustees shall comply with said demand within one year from the presentation thereof to the Trustees, but in any event such closing shall not be later than eighteen years after the death of the Donor.

13. All distributions of liquid assets or cash, whether income or principal, shall be in equal shares between the Beneficiaries except that in case of the death of a Beneficiary, the share shall go to the heirs, legatees or devisees of such Beneficiary. The discretion of the Trustees shall control as to the values to be assigned to various assets for the purpose of distribution.

The District Court found that the trust instrument provided gifts of present rather than future interests; that it was the intention of the donor that the gifts should vest in the donee-beneficiaries at once; that the donees were certain and the interest of each was certain; that the purpose of the trust was to conserve the assets and prepare them for liquidation and distribution; that the trust instrument contained no express power to accumulate; that any implication of power to accumulate is rebutted by the liquidation purpose, by the direction to distribute income, and by the power of a majority of the beneficiaries to block large improvements and to force final distribution; that the trustees were to act

merely as business managers for the beneficiaries; and that the direction to distribute income from time to time means at reasonable intervals (R. 34).

Accordingly, the District Court decided that the gift tax deficiency for 1937 was erroneously and illegally assessed against petitioner's testatrix and that the petitioner was entitled to recover the sum of \$2,915.58 with interest thereon at the rate of five percent per annum from February 24, 1939 (R. 35).

The circuit court of appeals reversed the judgment of the district court and denied the petition for rehearing (R. 60, 75).

#### ARGUMENT

Section 504 (b) of the Revenue Act of 1932 provides for the exclusion of the first \$5,000 of a gift to any person except as to gifts of future interests. Such interests are defined in Article 11, Treasury Regulations 79, as including estates, whether vested or contingent, which are limited to commence in use, possession or enjoyment at some future time. This definition was approved in *United States v. Pelzer*, 312 U. S. 399, and it has been interpreted to cover not only gifts which are limited to commence at a definite future time but also gifts qualified by, or dependent upon, the discretionary powers of a trustee. *French v. Commissioner*, 138 F. 2d 254 (C. C. A. 8th); *Welch v. Paine*, 130 F. 2d 990 (C. C. A. 1st); *Commissoner v. Gardner*, 127 F. 2d 929 (C. C. A.

7th); *Commissioner v. Brandegee*, 123 F. 2d 58 (C. C. A. 1st). See also *Commissioner v. Wells*, 132 F. 2d 405 (C. C. A. 6th); and *Helvering v. Blair*, 121 F. 2d 945 (C. C. A. 2d).

The court below held that the gifts here are dependent upon the discretionary powers of the trustees and so are gifts of future interests. Its conclusion is amply supported by the provisions of the trust instrument. The trustees are authorized to make distributions "from time to time" to the beneficiaries from "such accumulated income as may in their judgment not be needed as a reserve for taxes and other obligations" (R. 8). What such other obligations may include is indicated by the extremely broad powers given the trustees not only to improve, manage, lease, and subdivide the property, but also "to donate, to dedicate, to mortgage, pledge or otherwise encumber said property" (R. 9). In regard to any "building program," the trustees may incur expenditures up to \$3,000, and may also spend sums in excess of that amount unless a majority of the beneficiaries forbid (R. 6-7). Thus, even if the gifts of income can be treated as gifts to any extent of present interests, there is no evidence of their value, and, therefore, no exclusions as to gifts of such income can be allowed. See *Commissioner v. Brandegee*, 123 F. 2d 58 (C. C. A. 1st), and *Helvering v. Blair*, 121 F. 2d 945 (C. C. A. 2d).

The trust, although purportedly created for liquidation, may continue for eighteen years beyond the death of the donor unless a majority of the beneficiaries vote for earlier termination, and the beneficiaries have no power to anticipate or assign any income or principal to be paid them. Prior to termination, the trustees may, but only in their discretion, arrange the terms for withdrawals of nonliquid assets (R. 8). Obviously, such discretionary powers make both the time of distribution and the amounts to be distributed uncertain. Consequently the beneficiaries do not have the immediate and absolute enjoyment which is a prerequisite to the making of a gift of a present interest.

There is only one trust provision permitting distribution of the estate which is not conditioned upon an exercise of the trustees' discretion. Paragraph 12 of the indenture requires that the estate be distributed upon demand of a majority of the beneficiaries (R. 8). As the court below held, this majority demand is a contingency even more speculative than that involved in *Ryerson v. United States*, 312 U. S. 405, where a gift in trust of half the corpus to each donee, conditioned upon a joint request for termination of the trust, was held a gift of a future interest.

However, the decision here is alleged to be in conflict with *Disston v. Commissioner* (C. C. A. 3d), decided July 12, 1944 (C. C. H. Inheritance,

Estate and Gift Tax Service, par. 10, 132). In that case, gifts of trust income to minor children were held to be gifts of present interests. Although the trustees were authorized to accumulate such trust income to the extent that they might decide it was not needed for the education and support of the children, the court held that a minor's legal disability precluded him from receiving the income in hand currently and that the arrangement followed in the trust was the proper, if not the only, way to make gifts of such interests to minors. While the Government is preparing to file a petition for a writ of certiorari in the *Disston* case because of a conflict with *Fondren v. Commissioner*, No. 88, this Term, the *Disston* reasoning is confined to gifts to minors and hence is not applicable here. Here it does not appear that the donees are minors, and, from all that does appear, they are legally capable of receiving their gifts immediately. Consequently, as the trust provisions could actually prevent enjoyment of the income or corpus by the donees in this case for more than eighteen years, the gifts fall in the category of gifts of future interests, and are made under terms similar to gifts which have been so classified in other cases, particularly in *Commissioner v. Brandegee*, 123 F. 2d 58 (C. C. A. 1st), and *Ryerson v. United States*, 312 U. S. 405.

## CONCLUSION

The decision of the court below is correct and there is no conflict of decisions . The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1944.